

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Augusta Division

IN RE:)	Chapter 7 Case
)	Number <u>89-10275</u>
STEWART-HALL MARKETING, INC.)	
d/b/a STEWART MARKETING)	
)	
Debtor)	
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)	FILED
WAGT TELEVISION, INC.)	at 6 O'clock & 42 min. p.m.
)	Date: 2-1-91
Plaintiff)	
)	
vs.)	Adversary Proceeding
)	Number <u>89-1084</u>
STEWART-HALL MARKETING, INC.)	
)	
Defendant)	

MEMORANDUM AND ORDER

On November 3, 1989 WAGT Television, Inc. (hereinafter referred to as "WAGT") filed a complaint seeking declaratory judgment and injunctive relief regarding appropriate disposition for monies which either have been paid by various advertisers to WAGT or which have been paid or are owed by various advertisers to Stewart-Hall Marketing, Inc. (hereinafter referred to as "debtor"), for services rendered by WAGT. On December 7, 1989 debtor filed its answer and counterclaim asking that the monies paid to WAGT by various advertisers be turned over to the

debtor as a voidable preference pursuant to 11 U.S.C. §547. In its counterclaim, debtor

also alleges that WAGT tortiously interfered with its contractual relationships with its advertisers and seeks actual and punitive damages.

This court, pursuant to proper notice, on January 11, 1991 held a hearing on WAGT's demand for a declaratory judgment and injunctive relief. Based upon the evidence introduced at the trial and briefs submitted I make the following findings of fact and conclusions of law.

FINDINGS OF FACT

On February 28, 1988 debtor filed a Chapter 11 proceeding in this court. The Chapter 11 case was converted to a Chapter 7 proceeding by order of this court on December 7, 1989.

Since 1982 debtor operated an independent advertising agency in the Augusta, Georgia area. WAGT is a commercial television station broadcasting in the Augusta, Georgia area. Debtor, as an independent advertising agent, would solicit clients (advertisers) and construct an individual advertising program that complied with the clients needs and finances encompassing various advertising media. As compensation for this service debtor would receive 15% of the gross advertising

billed by the media. The term of the relationship between the debtor and the advertiser was month-to-month.

Upon ascertaining the needs and budget of the client, debtor would negotiate for advertising time or space with the various media sources. Debtor would independently negotiate with these media sources the price, time, place, manner, and means of the advertising program. Debtor, within its ordinary course of business, would place advertising with WAGT if debtor determined that WAGT possessed the appropriate media exposure at the correct price to maximize the debtor's client's needs. The decision of which media source to use was made independently by the debtor in each instance.

If the debtor chose to place advertising with WAGT, for a given client, WAGT would bill the debtor for the advertising time used. WAGT's billings to debtor would separate each of debtor's client's advertising charges. The term for payment was 90 days net. Debtor compiled all the various charges incurred from the various media sources utilized in carrying forward the client's advertising program and billed the client the total amount on a monthly basis. Upon receipt of the monthly charges, debtor's advertising clients would remit their payments to the debtor. Debtor would deposit all the funds in a general business account. Debtor at no time segregated any funds by client and/or media source. From billings paid, debtor would subtract 15% as his commission and remit the balance to the

various media sources as payment for their billings on the 90th day.

Debtor, at no time had any written contract with any media sources. Debtor was not obligated to advertise with any particular media source. Debtor's business acumen and professional judgment

determined which media source would be used for a client's advertisements.

Upon occasion WAGT would assist the debtor in collecting delinquent accounts receivable from clients but would remit the full amount collected to debtor. Debtor would then deposit the amount collected into its general operating account. WAGT at no time had any contractual relationship with debtor's clients.

WAGT had knowledge of the general operation of debtor's agency. Furthermore, WAGT was aware that debtor operated out of one general fund to pay all the various media sources and did not segregate its funds by client or media source. WAGT never expressly or implicitly required debtor to segregate any funds claimed by WAGT.

CONCLUSIONS OF LAW

WAGT alleges an agency relationship between it, as principal and the debtor, as agent. According to WAGT, the advertising revenues generated by the debtor through advertising time sold on WAGT television, less the 15% commission due debtor, was generated by debtor acting as WAGT's agent. According to WAGT

this revenue is its property and is not property of the debtor's bankruptcy estate. In Georgia a " . . . relation of principal and agent arises wherever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." (emphasis added) O.C.G.A. 10-6-1. An

expressed or implied agency relationship requires authorization for the agent to act for the principal. In order to have an agency relationship a "fiduciary relationship [must exist] which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control, and consent by the order so to act." Flournoy v. City Finance of Columbus Inc., 679 F.2d 821, 823-824 (11th Cir. 1982) (emphasis added). In an agency relationship-"the employer assumes, the right to control the time and manner of executing the work." McMullan v. Georgia Girl Fashions Inc., 180 Ga. App. 228, 348 S.E.2d 748 (1986). The principal controls the manner, means and time of the agent. See generally id., Hampton v. McCord, 141 Ga. App. 97, 232 S.E.2d 582 (1977). Debtor had no fiduciary obligations to WAGT. The debtor could buy advertising time from any media source considered by the debtor as appropriate for the client. WAGT could not require the debtor to advertise with it, nor did it control the debtor's action of when, where or with whom debtor would place advertising.

The debtor acted independently. There is no evidence of any express or implied agency relationship between the parties.

WAGT further alleges that debtor received payment for WAGT's invoices for advertising in a constructive trust for WAGT and therefore the proceeds are its property and not property of the debtor's bankruptcy estate. It is generally recognized that, if monies were determined to be within a constructive trust they are not property of the bankruptcy estate. See, Ace Electric Supply

Company v. Boswell Electric Contractors, (In re: Boswell Electrical Contractors) Chapter 7 case No. 88-11124, Adversary Proceeding No. 89-1056, (Bankr. S.D. Ga. Aug. Div., Dalis, J., June 27, 1990). "When property of the estate is alleged to be held in trust, the burden rest upon the claimant to establish the original trust relationship." 4 King, Collier on Bankruptcy, ¶541.13 (15th ed. 1990). WAGT has failed to meet this burden. "A constructive trust results from fraud, bad faith, abuse of confidence or violation of a fiduciary duty which gives rise to an obligation in equity to make restitution." In re: Cambridge Mortgage Corporation, 92 B.R. 145, 151 (Bankr. D.S.C., 1988). Also see generally, O.C.G.A. 53-12-26; In re: Inca Materials Inc., 880 F.2d 1307 (11th Cir. 1989). WAGT must prove either fraud, bad faith, abuse of confidence or violation of a fiduciary duty. No allegations were raised or evidence introduced regarding fraud or bad faith. WAGT contends an abuse of

confidence or violation of a fiduciary duty.

WAGT's reliance on Cambridge supra, is misplaced. While the issues are similar to those in our case, the facts are not and are distinguishable. In Cambridge, the Federal Home Loan Mortgage Corporation (FHLMC) had a contractual agreement with Cambridge. WAGT and debtor have no such agreement. In Cambridge, the agreement between Cambridge and FHLMC imposed a duty upon Cambridge to accurately and timely account for administration of escrow accounts. WAGT did not and could not impose such a duty upon the debtor. In Cambridge, Cambridge was required to make deposits of individual

mortgage payments into a business account which was established by it solely for the benefit of FHLMC and was named, "servicing account for FHLMC". In this case no such segregated account existed nor was required. In Cambridge this separate account allowed FHLMC to identify the payments on all its individual notes and "is fundamentally different from a case [such as before this court] which would require a creditor to trace its funds; e.g. where monies have been deposited into a debtor's general bank account and left there" See Cambridge at 151. The Cambridge court established that a constructive trust existed; however, all the indicia used in Cambridge to establish this trust is missing from this case.

Previously this court indicated that a contractor could be a trustee for his subcontractors and absent any express

contractual term held the funds in a constructive trust for the subcontractors. See Boswell supra. The Eleventh Circuit has found constructive trust in similar contractor situations. See Inca supra. Boswell, Inca, and Cambridge are consistent, however, not controlling in this case. In each of those cases a special confidence or fiduciary relationship existed between the parties that is missing in this case. In Cambridge the court articulated the duty and special relationship that a mortgage holder in the secondary mortgage market has with its servicing agents. In Inca the fiduciary relationship is established by the contractor's and subcontractor's special relationship created where labor and

material has been supplied to a project by the subcontractor or material supplier and a lien right is created. The fiduciary or special relationship or confidence may be created either statutorily, see Inca supra, (where a special relationship is established through Maryland's Little Miller Act), see also O.C.G.A. 44-14-361 or contractually, see, United Parcel Service v. Webon Industries Inc., 794 F.2d 1005 (5th Cir. 1986) (where this special relationship was contractually recognized). WAGT has failed to establish such relationship with the debtor either by law or contract.

Pursuant to 11 U.S.C. §541, debtor's estate consists of "all legal and equitable interest of the debtor in property as of

the commencement of the case." No express or implied principal/agent relationship existed between debtor and WAGT, and no other fiduciary or special relationship or confidence existed upon which to base a constructive trust for the benefit of WAGT. The debt owed by debtor to WAGT is an open account debt. Debtor does not now or has it never held any funds or accounts receivable in trust for WAGT.

On a month-to-month basis under an agreed upon budget, the debtor procured advertising time and space from available media sources for its advertising clients. The debtor used its best efforts on behalf of the advertiser to obtain the maximum exposure possible for the advertiser. In this regard the debtor negotiated with and purchased from various media sources time and space to

promote the advertiser's product or service. The debtor purchased the time or space on an open account basis from the media source and the media source billed the debtor for the purchase. Custom in the industry requires payment 90 days net. The debtor billed the advertiser monthly for all media source invoices and other services rendered to the advertiser. Regardless of when the advertiser paid the debtor, the debtor paid its bills to the media source on about the 90th day. The fact that WAGT failed to pursue collection efforts against the debtor when the debtor was unable to collect its billings from the advertiser was a business

decision of WAGT to protect other current and future business with the debtor and was not a decision based on liability. No agreement existed between the advertiser and the media source. In its dealings with both the advertiser and the media source the debtor acted as an independent contractor, nothing more.

It is hereby ORDERED that declaratory judgment and injunctive relief prayed for by the WAGT is denied;

it is further ORDERED that trial on the pending counterclaim shall proceed February 7, 1991 at 9:00 a.m.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia

this 1st day of February, 1991.